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No. 99-1908

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF U.S. ENGLISH AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress intended to create a private right of action in federal court against a State agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress.

No. 99-1908

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BRIEF OF U.S. ENGLISH AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE[1]

U.S. English is a national, non-partisan, non-profit, citizens' action group dedicated to preserving the unifying role of a common language in America. Current membership is over 1.4 million nationwide.

U.S. English was established in 1983 by the Honorable S.I. Hayakawa, noted educator, former United States Senator from California, and himself an immigrant to the United States. Senator Hayakawa's overriding concern in

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no entity other than *amicus* made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Office of the Clerk of this Court. *See* Sup. Ct. R. 37.3.

founding U.S. English was to ensure that English would continue to serve as an integrating force among our nation's many ethnic and linguistic groups, and that English would remain a vehicle of opportunity for new Americans. In his own words, "English is the key to full participation in the opportunities of American life."

Today U.S. English consists of two independent entities: U.S. English, Inc., a tax-exempt 501(c)(4) organization, which advocates the interests of its supporters before Federal and state legislatures and agencies; and U.S. English Foundation, Inc., a tax-exempt 501(c)(3) organization which disseminates information, sponsors educational programs, represents interests of official English advocates before state and Federal courts, and conducts research on language issues.

U.S. English supporters recognize the importance of preserving English as our common language for our national unity, equal opportunity, and economic advancement.

SUMMARY OF ARGUMENT

Amicus U.S. English endorses the Alabama Petitioners' reasons for certiorari, *i.e.*, that this case presents an important Title VI question, certiorari for which the Court granted but then did not resolve in *Seif*,[2] and that recipients of federal grants throughout the country "have an interest in knowing the scope of the obligations they assume" by taking federal grants, which "interest is frustrated when private

[2] *Seif v. Chester Residents Concerned for Quality Living*, cert. granted, 118 S. Ct. 2296, vacated as moot, 119 S. Ct. 22 (1998). The question presented (and accepted by the Court) in *Seif* was: "Did Congress intend to create a private cause of action in federal court that bypasses a federal agency's review and enforcement process under Section 602 of Title VI of the Civil Rights Act of 1964, simply by alleging a discriminatory effect in the administration of programs and activities of a federally-funded State or local agency?"

litigants direct disparate effect lawsuits at policies and practices that are not intentionally discriminatory and are unrelated to the purpose of the grant." In addition, *Amicus* respectfully submits that certiorari is warranted for three compelling ancillary reasons:

1. The Court of Appeals' holding that Alabama's official English drivers license testing policy is flatly at odds with a myriad of federal statutes and regulations that recognize, either directly or indirectly, the English language as the official language of the United States;

2. The Court of Appeals' holding that "Title VI flatly prohibits . . . English language policies that cause disparate impact on the basis of national origin" (citing *Lau v. Nichols*, 414 U.S. 563 (1974)) contorts this Court's ruling in *Lau*, the underlying premise of which was that ethnically Chinese American citizens who do not understand English need to be taught English first in order to participate fully in public schools; and

3. The Court of Appeals' holding that when "Spending Clause legislation functions as a quasi-contract between Congress and the States . . . , agency regulations are accorded substantial deference in assessing whether they outline a permissible construction of a congressional statute's purpose," is contrary to the rule of construction applied in *United States v. Heth*, 3 Cranch 399, 413 (1806) (Paterson, J.) ("[T]he words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the law-makers."); *see Vermont Agency of Natural Resources v. United States*, 120 S. Ct. 1858 (2000).

REASONS FOR GRANTING CERTIORARI

I. THIS COURT SHOULD GRANT CERTIORARI TO RECONCILE THE APPLICATION OF DISPARATE IMPACT REGULATIONS WITH THE MULTITUDE OF LAWS REQUIRING USE OF OR FACILITY WITH THE ENGLISH LANGUAGE

The issue of whether there is an implied private right of action to enforce Title VI disparate impact regulations is important yet unsettled. It is important because of the ramifications of allowing private litigants to enforce ambiguous provisions of Title VI of the Civil Rights Act, especially where, as here, Section 602 has been stretched beyond the limits of federal agency implementation. That this Court granted certiorari in *Seif* two years ago, but then avoided the accepted issue (on account of mootness in that case), indicates that the opinions of the various circuit courts, whether expressed in holdings or dicta, are unsettled.

As Petitioners note, Section 602 of the Civil Rights Act provides an elaborate process to ensure that an agency's finding of a disparate effect claim is well-founded and thoroughly considered. "Primary responsibility for prompt and vigorous enforcement of Title VI rests with the head of each department and agency administering programs of Federal financial assistance."[3] An agency may issue an order finding a grant recipient's practice to have caused a disparate impact on the basis of national origin only after providing an opportunity for a hearing. The agency must also first attempt to obtain voluntary compliance. Grant funds may not be terminated or denied pursuant to such a finding until the agency notifies Congress, provides Congress with a full

[3] 28 C.F.R. §50.3(b).

written report, and waits thirty days to give Congress time to review the report.[4]

Although Congress authorized federal agencies to enforce Title VI of the Civil Rights Act by establishing disparate impact regulations, Congress circumscribed that authority by requiring agencies to follow a process and to alert Congress to their findings before they are made effective. Allowing a private right of action that bypasses this elaborate congressional scheme deprives grant recipients of the procedural protections contained in the statute and recited above. It would also allow private litigants to pursue enforcement in situations where the federal agency with "[p]rimary responsibility for prompt and vigorous enforcement of Title VI"[5] has elected not to pursue.

Allowing a private right of action to enforce the disparate impact regulations promulgated by the U.S. Departments of Transportation[6] and Justice[7] violates the doctrine of "primary jurisdiction,"[8] which in this case has resulted in a series of judicial rulings below that are utterly at odds with the substantive regulations of both Departments. How is it that Alabama's English-language requirement to obtain a driver's license is illegal, yet facility with the English language is a U.S. Department of Transportation ("DOT") prerequisite to operate an aircraft or commercial motor vehicle, or to serve as an able seaman? How is it that Alabama's requirement that driving tests be administered only in English is illegal while access to U.S. Department of

[4] 42 U.S.C. §2000d-1.

[5] 28 C.F.R. §50.3(b).

[6] 49 C.F.R. §21.5(b)(2).

[7] 28 C.F.R. §42.104(b)(2).

[8] *See United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63-63 (1956) ("The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.").

Justice ("DOJ") administrative adjudicatory processes – as well as to the Supreme Court of the United States – is available only to those who submit documents in English?

Neither Congress nor the agencies entrusted by Congress to enforce Section 601 by rule, regulation, or order have mandated this anomalous result. Alabama is subject to this ruling only because the lower courts: (1) granted Martha Sandoval a private right of action, and (2) assuming the mantle of a federal regulatory agency under Section 602, equated Alabama's English-language drivers test with national origin discrimination.

A survey of the United States Code and Code of Federal Regulations would reveal more than three hundred references to the English language.[9] While some of these references require the federal government, state or local government, school, or private business to make reasonable accommodations to those who cannot speak, read, or write the English language, the vast majority of them require applications, records, reports, labels, manuals, and other documents to be submitted in the English language.[10] Thus,

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[9] These explicit references to the English language in essence reflect the universal practice in the federal government that all agency adjudications and rulemaking proceedings are conducted only in English. As the Sixth Circuit stated in *Frontera v. Sindell*, 522 F.2d 1215, 1220 (1975), "It cannot be gainsaid that the common, national language of the United States is English. Our laws are printed in English and our legislatures conduct their business in English." *See* S.I. Hayakawa explaining the purposes and effects of Official English; 127 Cong. Rec. S3998-99 (daily ed. April 27, 1981)(reproduced in the Appendix).

[10] DOT and its modal administrations, such as the National Highway Traffic Safety Administration (NHTSA) and the Maritime Administration, require the English language to be used on labels, *e.g.*, 49 C.F.R. §555.9 (temporary exemption labels), in petitions, *e.g.*, 49 C.F.R. §552.4 (petitions for rulemaking, defect, and noncompliance orders), in applications, *e.g.*, 46 C.F.R. §249.6(c) (application for approval of marine hull insurance underwriters), and in tariffs, *e.g.*, 14 C.F.R. §221.4 (tariffs and other documents filed with the Office of the Secretary).

in order for a person to participate in an agency rulemaking, seek a determination by a federal agency, apply for a grant or permit from a federal agency, that person typically must be able to speak, read, and understand English.

Heretofore, these requirements have been upheld against challenges that the failure to provide hearings, instructions, or other notice in the language of the non-English speaking person amounts to a denial of due process. In *Nazarova v. INS*, 171 F.3d 478 (7th Cir. 1999), the Court of Appeals held that the INS' failure to provide notice of the consequences of Nazarova's failure to appear on time at her deportation hearing in her native Russian did not violate due process. To hold otherwise would present:

> a broad and troublesome position: the logical implication is that the INS must maintain a stock of forms translated into literally all the tongues of the human race, and then select the proper one for each potential deportee. No court to our knowledge has even held that the Constitution requires the INS to undertake such a burden, and we will not be the first.

171 F.3d at 483.[11]

Moreover, where public safety is involved, three DOT modal administrations require proficiency with the English language to obtain a permit to operate a vehicle or perform a safety-related function. Even private pilots, the

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[11] *See also, Toure v. United States*, 24 F.3d 444, 446 (2d Cir. 1994) (failure to provide notice of seizure of currency in French rather than English did not violate due process); *Soberol-Perez v. Heckler*, 717 F.2d 36, 43 (7th Cir. 1983), *cert. denied*, 466 U.S. 929 (1984) (failure to provide notice to Social Security claimants in did not violated due process); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (failure to conduct Civil Service Commission exam in language other than English did not violate Constitution).

aviation analog to private motor vehicle operators, are required by the Federal Aviation Administration ("FAA") to "read, speak, write, and understand the English language."[12] Coast Guard regulations require "able seamen" to "speak and understand the English language as would be required in performing the general duties of an able seaman and during an emergency aboard ship"[13]; other maritime personnel are subject to similar requirements.[14] The Federal Highway Administration requires drivers of commercial motor vehicles to "read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records."[15]

Other federal agencies with authority to safeguard the public health and safety, such as the Food Safety and Inspection Service of the Agriculture Department, the Consumer Product Safety Commission, the Environmental Protection Agency, the Food and Drug Administration, and the Bureau of Alcohol, Tobacco, and Firearms, all require labels and manuals to be written in English.

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[12] 14 C.F.R. §61.103. In Title 14 of the Code of Federal Regulations, the FAA requires that an applicant for the following certificates "read, speak, write, and understand the English language": instrument ratings, §61.65; private pilot based on foreign pilot license, §61.75; student pilot, §61.83; recreational pilot, §61.96; private pilot, §61.103; commercial pilot, §61.123; airline transport pilot, §61.153; flight instructor, §61.183; ground instructor, §61.213; flight engineer, §63.31; flight navigator, §63.51; air traffic control tower operator, §65.33; aircraft dispatcher, §65.53; mechanic, §65.71; repairman, §65.10; and parachute rigger, §65.113.

[13] 46 C.F.R. §12.05-3(a).

[14] *E.g.*, 46 C.F.R. §12.10-3(b) (lifeboatmen); 46 C.F.R. §12.15-3(c) (engine department personnel).

[15] 49 C.F.R. §391.11(b). Similarly, persons who transport migrant workers are subject to the same requirements. 49 C.F.R. §398.3(c).

The DOJ Rules of Practice governing administrative hearings involving allegations of unlawful employment of aliens, unfair immigration-related employment practices, and document fraud require that "all documents presented by a party in a proceeding must be in the English language or, if in a foreign language, accompanied by a certified translation."[16]

Similarly, the rules of this Supreme Court of the United States of America provide that all foreign language documents must be accompanied by an English translation.[17]

Amicus is not aware of any specific federal requirement, whether imposed by regulation or order under authority of Section 602, that a recipient of federal funds must take affirmative steps to accommodate non-English speaking persons in any area other education and voting. Certainly there is no such specific requirement imposed by DOT or DOJ on Alabama or any other State to administer public health or safety-based programs in English or to grant safety-based permits to engage in activities with potential risk to the public to those who do not read, speak, or understand English.[18]

In its brief to the Court of Appeals below, the most the United States could say about the federal "law" Alabama

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[16] 28 C.F.R. §68.7(e). Also, all submissions to the Justice Department required by the Foreign Agents Registration Act must be in the English language. 28 C.F.R. §5.206(a).

[17] Sup. Ct. R. 31("Translations").

[18] The DOJ regulation cited with approval by the Court of Appeals, 28 C.F.R. §42.405(d)(1), is inapposite. That regulation requires grant recipients to provide foreign language assistance where a significant number of persons likely to be affected by a federally assisted program "needs service or information in a language other than English in order effectively to be informed of or to participate in the program." We doubt this regulation would be cited by DOJ for the proposition that Alabama must administer its drivers test in each applicant's native or spoken language, yet this is the clear implication of the Court of Appeals' ruling.

is said to have violated was: "Policies that require fluency in English in order to receive benefits can have a disparate impact on the basis of national origin. The Supreme Court so held in Lau v. Nichols, 414 U.S. 563 (1974), and the agencies responsible for implementing Title VI have consistently espoused that view in regulations and interpretive guidance." Brief for the United States as Intervenor and as Amicus Curiae, filed January 11, 1999, at 6. These federal "regulations and interpretive guidance" are neither express legal authority nor the "Rule of Law."[19]

This lack of express legal authority is not surprising, given that English-language requirements are prevalent throughout the federal government. It is also not surprising, given the difficulty, if not impossibility, with crafting an appropriate remedy, one that accommodates the non-English speaking persons but neither compromises the public health or safety nor imposes unreasonable burdens on the grant recipients. Here, the only specific remedy ordered by the district court, in an order granting a stay pending appeal, was to require Alabama to administer the driver's test in seven

[19] In *Marbury v. Madison,* Chief Justice John Marshall stressed that "[t]he government of the United States has been emphatically termed a government of laws, and not of men." 5 U.S. (1 Cranch) 137, 163 (1803). "Rule of Law . . . means that the government in all its actions is bound by rules fixed and announced beforehand -- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." F. von Hayek, *The Road to Serfdom* 72 (1944); *see* S. von Pufendorf, VII *De Jure Naturae et Gentuim: Libri Octo* Ch. VI, §11 (1688) (C.H. & W.A. Oldfather trans. 1934) ("[I]t is clear in what sense its to be taken the statement of the ancient Greek writers on politics and their followers, namely, that the government of a state should be committed to laws rather than to men. For that can have no other fit meaning than this: Care should be taken that those who rule should govern the commonwealth according to the direction of established laws, rather than by their own private and uncircumscribed pleasure." (Citation omitted)).

languages other than English.[20] If it indeed is a violation of Section 602 to administer a driver's test to a non-English speaking person in English, there is no principled limit to this ruling. If there is only one person who speaks a particular language in the entire State of Alabama, or perhaps five or ten, why would they not be entitled to administration of the test in their own native language?[21]

II. *LAU V. NICHOLS* NEEDS CLARIFICATION

Amicus endorses Alabama's argument, for the reasons stated in their Petition at 15-18, that this Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974), does not support the Court of Appeals' holding that a private right of action is available under Section 602. *Amicus* would add that *Lau*, if it remains "good law," also does not support the Court of Appeals' holding that Alabama's English-language requirements for drivers constitutes national origin discrimination in violation of Section 602.

This case presents this Court with a clear opportunity to clarify the continuing validity of *Lau*, both with respect to whether a private right of action exists under Section 602 and whether a disparate effect violates Title VI itself. The lengths to which the Court of Appeals went in discussing *Lau*

[20] The district court initially ordered Alabama to make "reasonable accommodations" to non-English speaking applicants, without specifying what accommodations would suffice.

[21] *Cf. Lau v. Nichols*, 414 U.S. at 572 (Blackmun, J., and Burger, C.J., concurring in the result)("I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of the case and my concurrence is to be understood accordingly.").

in the wake of this Court's decisions in *Alexander v. Choate*, 469 U.S. 287 (1985), *Guardians Assn. v. Civil Service Comm'n of New York*, 463 U.S. 582 (1983), *University of California Board of Regents v. Bakke*, 438 U.S. 265 (1978) and *United States v. Fordice*, 505 U.S. 717 (1992), demonstrate the need for this Court to straighten out this uncertain body of law.

In *Lau*, the Supreme Court held that the failure of the San Francisco public schools to either provide English language instruction to Chinese-speaking students or teach these students in Chinese violated regulations promulgated by the Department of Health, Education and Welfare ("HEW") pursuant to its authority under Section 602 to enforce the nondiscrimination provision in Section 601. The underlying premise of *Lau* was that ethnically Chinese American citizens need to be taught English first in order to participate fully in the federally funded San Francisco public schools.

In several respects, *Lau* neither dictates nor suggests the holding of the Court of Appeals. First, the Court in *Lau* did not determine the remedy for this violation. Indeed, it noted that "[n]"o specific remedy is urged upon us." 414 U.S. at 564. Here, the Court of Appeals did not hold illegal Alabama's failure to provide English-language instruction to enable non-English speaking persons to qualify for a driver's license. Instead, it found illegal the failure of Alabama to allow non-English speaking persons the privilege to drive without learning even the basics of English. This finding is inconsistent with the remedy implicitly recommended by this Court in *Lau*: "the [school] district must take affirmative steps to rectify the language deficiency . . . ." 414 U.S. at 568 (quoting HEW clarifying guidelines) (internal quotes omitted).

Second, three concurring Justices in *Lau* focused on interpretive guidelines issued by the HEW Office of Civil

Rights, which "clearly indicate that affirmative efforts to give special training for non-English speaking pupils are required by Title VI as a condition for receipt of federal aid to public schools." 414 U.S. at 570 (Stewart, J., with Burger, C.J. and Blackmun, J., concurring in the result). Unlike the HEW regulations and guidelines at issue in *Lau*, DOT and DOJ regulations do not require any affirmative steps to be taken by grant recipients with respect to non-English speaking drivers.

Third, the HEW regulations at issue in *Lau* pertained to education, not the public health and safety. Where education is concerned, federal requirements are geared to ensuring that all students are given a meaningful education. Where the public health and safety is implicated, federal requirements ensure that labels, instructions, warnings, and signals are in English so that they can be understood and observed. For those performing safety functions, including commercial operators of motor vehicles, federal requirements provide that they must be able to speak, read, write, and understand the English language. While the Eleventh Circuit gave no weight to the safety rationale behind Alabama's English-language requirements, it is obvious that the English-language requirements of federal agencies, most notably the grantor department in this case, DOT, are based primarily if not entirely on safety.

Thus, far from following *Lau*, the Court of Appeals transformed *Lau* into something this Court has never countenanced, and should not embrace now.[22]

III. WHEN SPENDING CLAUSE LEGISLATION FUNCTIONS AS A QUASI-CONTRACT BETWEEN CONGRESS AND A

[22] For these same reasons, the Court of Appeals erred in finding that *Lau* provided Alabama with notice that its English-language requirements were suspect.

STATE, AMBIGUITIES SHOULD BE CONSTRUED *CONTRA PROFERENTEM*

The Eleventh Circuit's holding that when "Spending Clause legislation functions as a quasi-contract between Congress and the States . . . , agency regulations are accorded substantial deference in assessing whether they outline a permissible construction of a congressional statute's purpose," is contrary to the rule that ambiguous words in a contract be construed *contra proferentem,* as well as to two related rules of construction applied by this Court recently in a federalism statutory construction context. *Vermont Agency of Natural Resources v. United States*, 120 S. Ct. at 1870.

A. Spending Clause Legislation Impinging Upon Unconsenting States Raises Federalism Issues Not Yet Resolved by This Court

The Spending Clause remains a significant exception to the rule that the federal government "may not compel the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). In *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), this Court recognized "the 'constitutional difficulties' with imposing affirmative obligations on the States pursuant to the spending power. That issue, however, is not now before us." 451 U.S. at 17 n.13. At least one such unresolved "constitutional difficulty" is squarely presented in this case.

If the Eleventh Circuit's holding below becomes the law of this land, the executive and judicial branches of the federal government will have effectively compelled the fifty States to administer an expansive interpretation of Title VI contractual obligations. As such, this case presents a statutory delegation of legislative authority "not canalized within banks that keep it from overflowing." *A.L.A.*

Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring), and a concomitant urgent need for this Court to update its guidance for lower courts: "[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Food and Drug Administration v. Brown & Williamson Tobacco Corp.,* 120 S. Ct. 1291, 1315 (2000); *see Loving v. United States*, 517 U.S. 748, 770 (1996) ("The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes." (citations omitted)).

As of this Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987), *United States v. Butler*, 297 U.S. 1 (1936), was "the last case in which this Court struck down an Act of Congress as beyond the authority granted by the Spending Clause." 483 U.S. at 216 (O'Connor, J., dissenting). In *Butler*, Congress through the Agricultural Adjustment Act had attempted to regulate through the spending power. *See* 483 U.S. at 216. The Court's analysis in *Butler* came down to a fundamental federalism analysis, equally applicable in this case: "The question is not what power the federal government has, but what powers in fact have been given by the people." 297 U.S. at 63.

In her dissent in *South Dakota v. Dole*, Justice O'Connor, while "subscrib[ing] to the established proposition that the reach of the spending power 'is not limited by the direct grants of legislative power found in the Constitution,'" 483 U.S. at 212-13 (quoting *Butler*), also identified two essential attributes of a legitimate exercise of the spending power: "the conditions imposed must be unambiguous"; and "the statute is entirely unambiguous." 483 U.S. at 213 (citations omitted). In this case, both the conditions and the statute are at best ambiguous. Neither Title VI nor the DOT's implementing regulations (both

included in the appendix to Alabama's Petition) even hint that Alabama's English-only drivers license testing policy violates Title VI.

The only federal regulations arguably unambiguous on this issue are EEOC guidelines that the U.S. Court of Appeals for the Ninth Circuit flatly rejected in *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994) (rejecting the EEOC's "English-only rule Guidelines," 29 C.F.R. §1606.7(a) (1991),[23] as applied in a Title VII disparate impact case against a private sector employer.

In 1992, this Court applied the *Butler* federalism analysis to strike down the low-level Radioactive Waste Policy Amendments of 1985 as having crossed "line distinguishing encouragement from coercion." *New York v. United States*, 505 U.S. 144, 175 (1992). "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require States to regulate." 505 U.S. at 177.

Although *Butler* and *New York* both involved coercive acts of Congress, the *Butler/New York* analysis applies equally to coercive acts of federal agencies and courts: "The question is not what power the federal government has, but what powers in fact have been given by the people" 297 U.S. at 63 (quoted at 505 U.S. at 157). *Amicus* respectfully suggests that the people have never given the federal government the power to frustrate Alabama's efforts to empower all of its citizens through

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[23] "The EEOC enacted this scheme in part because of its conclusion that English-only rules may 'create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.' 29 CFR § 1606.7(a)." 998 F.2d at 1489. For an authoritative and comprehensive explanation of the nondiscriminatory and empowering purposes of Official English laws, see S.I. Hayakawa, 127 Cong. Rec. S3998-99 (daily ed. April 27, 1981) (reproduced in the Appendix).

nondiscriminatory policies that encourage facility in our common language, English, such as Alabama's English-only drivers license testing requirement.

B. Quasi-Contractual Ambiguities Ought to Be Construed Against Congress

Federal "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981) (internal citations omitted).

For the same "considerations" reiterated recently by this Court in *Vermont Agency of Natural Resources, supra,* 120 S. Ct. at 1870, it is critical that Spending Clause contracts between the federal government and the States be interpreted according to the plain terms of those contracts, with any ambiguities being construed in favor of the States. Under the approach taken by the Eleventh Circuit and other courts of appeals, however, any ambiguities in Title VI contracts can be construed after-the-fact by the federal agencies, the contractual parties who proffered – ostensibly by delegated legislative authority – the ambiguous language. *But see United States v. Heth, supra*, 3 Cranch at 409 (Johnson, J.) ("If it be necessary that the court should make an election between [alternative constructions of ambiguous statutory] words, . . . the words should be taken most strongly '*contra proferentem.*'"); 3 Cranch at 413 (Paterson, J.)

("[T]he words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the law-makers."); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (Scalia, J. & Thomas, J., concurring in the judgment in part and dissenting in part) ("[A]ny ambiguity concerning [a preemption clause's] scope will be read in favor of preserving state power.").[24]

Finally, if the "not canalized within banks" coercive power of the national government is allowed to stand in this case, involving a sovereign State as defendant, its effects will spill over into the private sector vis-à-vis parallel disparate impact provisions of Titles VI and VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act ("ADEA"). *Compare, e.g., Garcia v. Spun Steak Co., supra*, (rejecting the EEOC's "English-only rule Guidelines, as applied in a Title VII disparate impact case against a private sector employer), *with Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2105 (2000) ("This Court has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964, also applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here.").

Amicus respectfully suggest that when this Court focuses on the legislative intent behind Title VI as applied to this case, the question presented by the Alabama Petitioners, as urgent as it is for this Court to resolve, answers itself: "The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that

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[24] *See generally Mesa Air Group, Inc. v. Department of Transportation*, 87 F.3d 498, 506 (D.C. Cir. 1996) (buttressing the appellate court's federal government-private party contractual analysis with *contra proferentem*).

Congress will not implicitly attempt to impose massive financial obligations on the States." *Pennhurst*, 451 U.S. at 16-17 (emphasis in original). "Our conclusion is buttressed by two other considerations that we think it unnecessary to discuss at any length: first, 'the ordinary rule of statutory construction' that 'if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute,' and , second, the doctrine that statutes should be construed to avoid difficult constitutional questions." *Vermont Agency of Natural Resources, supra,* 120 S. Ct. at 1870 (internal citations omitted).

CONCLUSION

For the reasons stated in the Alabama Petition and in this *amicus* brief, this Court should grant the writ of certiorari and, on review, reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

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APPENDIX

SENATOR S.I. HAYAKAWA ON THE PURPOSE AND EFFECTS OF OFFICIAL ENGLISH
27 CONG. REC. S3998-99
(DAILY ED. APRIL 27, 1981)

[L]anguage is a powerful tool. A common language can unify; separate languages can fracture and fragment a society. The American "melting pot" has succeeded in creating a vibrant new culture among peoples of many different cultural backgrounds largely because of the widespread use of a common language, English.

Learning English has been the primary task of every immigrant group for two centuries. Participation in the common language has rapidly made available to each new group the political and economic benefits of American society. Those who have mastered English have overcome the major hurdle to full participation in our democracy.

Today I am introducing a constitutional amendment declaring as the law of the land what is already a political and social reality: That English is the official language of the United States.

This amendment is needed to clarify the confusing signals we have given in recent years to immigrant groups. For example, the requirements for naturalization as a U.S. citizen say you must be able to "read, write, and speak words in ordinary usage in the English language." And though you must be a citizen to vote, some recent legislation has required bilingual ballots in some areas. This amendment would end that contradictory, logically conflicting, situation.

Bilingual education programs were originally designed to help non-English-speaking children learn English quickly so they could join the mainstream of education and

of our society. The Carter administration attempted to substantially broaden this mandate by proposing requirements for schools to teach other academic subjects entirely in students' native language.

I am proposing this amendment because I believe that we are being dishonest with the linguistic minority groups if we tell them they can take full part in American life without learning the English language. We may wish it were otherwise, but it simply is not so. As the son of an immigrant to an English-speaking country, I know this from personal experience. If I spoke no English, my world would be limited to the Japanese-speaking community, and no matter how talented I was, I could never do business, seek employment, or take part in public affairs outside that community.

Let me explain what the amendment will do, upon its passage by Congress and ratification by three-fourths of the States:

It will establish English as the official language of State, Federal, and local government business;

It will abolish requirements for bilingual election materials;

It will allow transitional instruction in English for non-English speaking students, but do away with requirements for foreign language instruction in other academic subjects;

It will end the false promise being made to new immigrants that English is unnecessary for them.

On the other hand, and this is important, there are things the amendment will not do:

It will not prevent the use of any other language within communities, churches, or cultural schools.

That is, Yiddish schools, Hispanic schools, Japanese, and Chinese schools are perfectly all right insofar as their support by local communities, but not by the taxpayer.

It will not prevent the use of second languages for the purpose of public convenience and safety, for example on signs in public places, but it will not allow governments to require multilingual postings or publications.

I am thinking, Mr. President, of such signs as you see in the street sometimes, "Danger, construction area." If this sign is put up in a building lot in Chinatown, let us say, there is certainly no objection whatsoever to putting signs to that effect in Chinese or any other language that is appropriate for the passerby. So, for purposes of public convenience and safety, other languages may be used wherever necessary. I think that what we have, in Washington, Los Angeles, and San Francisco, street signs in Chinese or Japanese, are perfectly acceptable, because they are also accompanied by street signs in English. They are also acceptable because they give a cosmopolitan flavor to those cities that have them and we are proud of the fact that we are a cosmopolitan culture.

My amendment, Mr. President, will not prevent public schools from offering instruction in other languages, nor will it prevent schools and colleges from requiring some study of a foreign language.

Incidentally, Mr. President, we are crippled in international relations because of our imperfect command not only of the well known languages like Spanish, French, German, or Italian, but we have very few speakers of Chinese, Japanese, Russian, Hungarian, Arabic, Thai -- some languages some people here ought to know so they can serve our Nation intelligently in diplomatic service or in trade. If we have a huge trade deficit vis-à-vis Japan, for example, it is because they have some Japanese salesmen speaking English in New York, Chicago, Los Angeles, and elsewhere, but we have very, very few Japanese-speaking Americans doing a selling job in Tokyo or Osaka.

So, at the same time that I declare English to be the official language of the United States, I am not trying to discourage foreign language studies.

The ability to forge unity from diversity makes our society strong. We need all the elements, Germans, Hispanics, Hellenes, Italians, Chinese, all the cultures that make our Nation unique. Unless we have a common basis for communicating and sharing ideas, we all lose. The purpose of this proposal is to insure that American democracy always strives to include in its mainstream everyone who aspires to citizenship, to insure that no one gets locked out by permanent language barriers.